

pleader was allowed although claims did not arise from the same contract. *Boyle v. Manion*, 74 Miss. 572, 21 So. 530 (1896). This entire topic is treated in the excellent article by Professor Chafee, *supra*, in which he concluded that the matter of claiming the same debt should be treated more liberally.

One might argue that statutory interpleader "in action upon contract, or for recovery of personal property," is to be used only in law actions, since actions for money due, or damages for the breach of contract and for replevin, were law actions. *Bridge v. Martin*, 2 Ohio Dec. Rep. 410 (1860). Therefore the narrow common law interpleader should govern the requirements of the statutory interpleader, since its jurisdiction is a purely statutory one. But assuming that it was intended to apply only to law actions, it should not be restricted in its application by the old common law requirements. It is doubtful whether the Legislature intended to require the common law essentials. The case of *Boyle v. Manion*, *supra*, expresses a preferable view. The court said that the intention of the Legislature was to enlarge the scope of interpleader and have the rights of the parties adjudicated on the basis of the merits of the case. In the Ohio Statute of the eight requirements of equitable interpleader, four are in some manner mentioned. Did the Legislature intend that the other four be included? The Ohio courts have included them. It seems reasonable that if all eight "requirements" were intended to be necessary, the Legislature would have so stated, instead of mentioning only certain ones.

Because of the limited facts given in the principal case, one cannot determine whether the applicant was responsible for his own precarious position. He might possibly have created contractual liability to two parties, knowing full well the results of his acts. This factor by itself would be sufficient basis for denying any relief of interpleader.

SAM TOPOLOSKY

NEGOTIABLE INSTRUMENTS

SET-OFF AS A DEFENSE UNDER THE N. I. L.

The plaintiff executed a note and mortgage to a bank. After maturity the bank indorsed and assigned the note and mortgage to the defendant insurance company. At the time of the transfer the plaintiff had on deposit in the bank a larger sum than the balance then due upon the note. No notice of the transfer was given to the plaintiff until after the bank had closed its doors. The plaintiff prayed that his deposit be

set-off against the note and mortgage. The defendant insurance company filed an answer and cross-petitioned that, if a set-off were allowed to the plaintiff, then the Superintendent of Banks should hold an equivalent amount in trust for the insurance company. The Superintendent of Banks answered that the note and mortgage were indorsed, assigned, and transferred by the bank to the insurance company after maturity and without recourse. Held, "upon payment by the plaintiff to the insurance company of a sum equalling the amount of dividends received by the plaintiff, proportioned to the relation of the set-off and entire account of the plaintiff, the note and mortgage will be cancelled and surrendered to the plaintiff." *Smith v. Fulton, Supt. of Banks*, 51 Ohio App. 12, 4 Ohio Op. 291, Ohio Bar, Dec. 30, 1935.

It would seem that Section 11321, General Code, is determinative of this case. It provides: "When cross demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim or set-off could have been set up, neither can be deprived of the benefit thereof by assignment by the other, or by his death. The two demands must be deemed compensated so far as they equal each other." A negotiable instrument after maturity is a demand within the meaning of the statute, and thus the maker of a note cannot be deprived of the benefit of a set-off against the payee by an assignment after maturity.

Although the court cited this section, it also relied on Section 8163, General Code (Section 58 of the Uniform Negotiable Instruments Law): "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable. . . ." Indeed, paragraph 3 of the syllabus reads: "The term defenses as used in Section 8163, General Code, prescribing the defenses to which a negotiable instrument is subject in the hands of a holder other than in due course, includes set-off." The court points out that a set-off was allowed under similar circumstances before the adoption of the Negotiable Instruments Law. *Baker v. Kinsey*, 41 Ohio St. 403 (1884): that the term "defenses" in a statute similar to Section 8163 was construed as including set-off. *Follett, Adm'r v. Buyer*, 4 Ohio St. 587 (1855); and that the courts of this country are about equally divided for and against the allowance of set-offs in such cases. 70 A.L.R. 248.

On the other hand, most text writers have insisted that a set-off is not a defense within the meaning of Section 58. Chitty, Bills 13th Am. ed. 251, 3 Daniell Negotiable Instruments 7th ed. Section 1693, p. 1745. ". . . set-offs are in no sense 'defenses' to a negotiable (or

non-negotiable) instrument. They do not constitute 'defects of title' nor 'infirmities' in the instrument, nor do they in any wise discredit the paper." Bigelow, Bills, Notes, and Checks, 3rd ed. p. 445. Under the law merchant the indorsee after maturity of a negotiable instrument took it subject only to equities attaching to or inherent in the instrument itself at the time of the transfer and equities arising out of the instrument which exist at the time of the transfer. *Pusey & Jones Co. v. Hansen*, 279 Fed. 488 (C.C.A., 3rd C., 1922), reversed on other grounds, 261 U.S. 491, 67 L.E. 763, 43 S. Ct. 454 (1922). *Worden v. Gillett*, 275 Fed. 654 (D.C., S.D. Fla. 1921). The opinion in *Stegal v. Union Bank*, 163 Va. 417, 176 S.E. 438 (1934) contains an exhaustive discussion of the problem before and after the passage of the Negotiable Instruments Law. The conclusion reached in that case is that it could not have been the intention of the drafters of the Negotiable Instruments Law that defenses "should mean technical defenses and offsets in one state, and technical defenses, but not offsets in another," *supra*, p. 459. But it is probable that that is just what the drafters did intend. When the Negotiable Instruments Law was submitted to the legislatures of the several states, the following note was appended to section 58: "It is not deemed expedient to make provision as to what equities the transferee will be subject to; for the matter may be affected by the statutes of the various states relating to set-off and counterclaim. On the question whether such equities may be asserted as attach to the bill, or whether equities arising out of collateral matters may also be asserted, the decisions are conflicting. In an act designed to be uniform in the various states, no more can be done than fix the rights of the holders in due course." *Stegal v. Union Bank, supra*, p. 453. Evidently it was not thought important that the law as regards holders not in due course should be uniform. Apart from the question of the meaning of "defense" in section 58, it seems that the decision in this case is correct and that the law as it stands does substantial justice.

D. M. POSTLEWAITE

PROBATE PRACTICE

RIGHT OF JURY TO FIX THE TIME OF DEATH WHERE A PRESUMPTION ARISES FROM SEVEN YEARS' UNEXPLAINED ABSENCE—POWER OF PROBATE COURT TO APPOINT AN ADMINISTRATOR IN THE ABSENCE OF STATUTE

John W. Phillips, an insurance agent, worked his regular territory in Columbus on June 27, 1922, and was last seen that evening on the street car which ordinarily took him to his home. Four days later, an